In his direct appeal to the First Circuit, Stern presented the following issue:

> **WHETHER THE DISTRICT COURT WAS DEPRIVED OF JURISDICTION TO TRY, CONVICT AND SENTENCE STERN WHERE ALL OF THE ELEMENTS OF THE OFFENSES CHARGED WERE NOT INCLUDED IN THE INDICTMENT OR PRESENTED TO THE TRIER OF FACT OR PROVEN AT TRIAL BEYOND A REASONABLE DOUBT AS REQUIRED UNDER *APPRENDI v. NEW JERSEY*, 530 U.S. 466 (2000)?**

On February 19, 2004, the First Circuit Court of Appeals affirmed the Judgment of the district court, saying in relevant part:

> Stern acknowledges that this court has already rejected his argument invoking ***Apprendi***. . . . "***Apprendi*** simply does not apply to guideline findings that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum." ***United States v. Caba***, 241 F. 3d 98, 101 (1st Cir. 2001). "Nothing in ***Apprendi*** or [other] cases" – including ***Ring v. Arizona***, 536 U.S. 291 (2002), the grant of certiorari in ***Blakely v. Washington***, 124 S.Ct. (Oct. 20, 2003), and ***United States v. R.L.C.***, 503 U.S. 291 (1992). . . . – "calls into question the validity of the Sentencing Guidelines." . . . ***For the present we have no reason to think that Apprendi will be applied to the federal guidelines.*** App 1-2 (emphasis added).

On March 25, 2004, Stern filed a Petition for Panel Rehearing and En Banc Determination which was denied on April 22, 2004. App. 5-6.

On September 16, 2004 Stern filed his Petition for Writ of Certiorari with this Court relying on ***Apprendi v. New Jersey*** and ***Blakely v. Washington***, 542 U.S. 296 124 S.Ct. 2531 (2004), which had just been decided by this Court as authority to set aside the sentence and conviction which had been entered against him.

On January 24, 2005, this Court granted the Petition for Writ of Certiorari, vacated the Judgment of the First Circuit Court of Appeals of February 19, 2004, and remanded the case for further consideration in light of ***United States v. Booker***. App. 13.

Upon remand the First Circuit directed the parties to file supplemental briefs dealing with the issue of whether ***Booker*** error had been preserved and whether the plain error doctrine enunciated by the First Circuit in ***United States v. Antonakopoulos***, 399 F. 3d 68 (1st Cir. 2005) warranted remand to the district court for resentencing. Nowhere in the order was there any discussion or directive relative to the Fifth and Sixth Amendment issues previously raised by the Petitioner that the district court was deprived of jurisdiction to try, sentence and convict him under the facts of the instant case.

On May 31, 2005 Petitioner submitted his Supplemental Brief asserting that the plain error doctrine was inapplicable, that ***Booker*** had affirmed the due process jurisprudence recited in ***In Re Winship***, 397 U.S. 358 (1970) and culminating with this Court's decision in ***Blakely***. Petitioner further contended that the First Circuit was obligated to take up his jurisdictional challenge which

had not been addressed in the First Circuit's original decision affirming the Petitioner's conviction.

The First Circuit, without addressing the Fifth Amendment challenge to his conviction, affirmed without hearing and further briefing, the district court's sentence and Judgment of Conviction. The First Circuit in its Judgment of June 29, 2005 stated that Petitioner's arguments in the Supplemental brief "misapprehend[s] both the remedial opinion in ***Booker*** and circuit precedent and we reject them out of hand." App. 13.

To preserve his challenge to the Judgment of Conviction the Petitioner seeks review by submission of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The primary reason for granting Petitioner's Writ of Certiorari is to clarify the application of ***Apprendi*** to the constitutional claim that the failure of the government to include money amounts in the indictment violated the Fifth Amendment right to a valid "presentment or indictment of a Grand Jury," and violated his due process rights as well. Further support for Petitioner's contentions was expressed in this Court's teachings in ***Blakely v. Washington***.

Petitioner has exhausted every means available to bring these issues before the Court of Appeals for the First Circuit. On two separate occasions, once in his direct appeal in the initial Brief filed on September 12, 2003 and later on May 31, 2005 in his Supplemental Brief filed after this Court's grant of Certiorari, he presented this Fifth

Amendment challenge to his conviction and sentence. On both occasions the First Circuit failed to address the question presented.

The First Circuit's failure to address Petitioner's arguments has created a conflict with other Circuits who have held that the failure of an indictment to charge an offense may be treated as a jurisdictional defect and raised at any time.

This case presents an excellent vehicle for the Court to address and decide the open question as to whether the failure of the government to allege and prove at trial money amounts which result in a criminal defendant's sentence and conviction violates the Fifth Amendment of the Constitution, and resolve the conflict in the Circuit Courts of Appeal described above.

SUMMARY OF ARGUMENT

The First Circuit has continued in its persistence in refusing to address the Fifth Amendment challenge to Petitioner's conviction. As evidenced from the Trial Transcripts (App. 22-25) and continuing with his reliance upon ***Apprendi*** in his direct appeal, the Petitioner raised a serious Fifth Amendment challenge to his conviction. He suggested that the district court was deprived of the jurisdiction to try, sentence and convict him where all of the elements of the offenses charged were not included in the indictment or presented to the trier of fact or found at trial by the constitutional standard of beyond a reasonable doubt.

This failure was further exacerbated by the refusal of the First Circuit to follow the mandate of this Court in reassessing this issue subsequent to the grant of Certiorari following this Court's decision in ***Booker***. Just as all the Circuit Courts of Appeal did following this Court's holding in ***Apprendi***, the First Circuit refused to consider the open question of whether the due process clause requires that an indictment contain all of the facts and elements necessary to establish the crime with which a defendant is charged.[3]

After ***Booker*** was decided, and the Judgment of the First Circuit vacated, the Petitioner again presented his position asserting that the due process jurisprudence recited in ***Winship*** had been reaffirmed in both ***Blakely*** and ***Booker*** thereby casting the instant case, not one addressed only to a sentencing error, but one which required the First Circuit to examine and decide the challenge and the contention of constitutional magnitude that the Fifth and Sixth Amendment notice and grand jury rights were implicated sufficient to warrant the setting aside the Petitioner's conviction.

The facts of the instant case are relatively clear and simple. The ***Apprendi*** issue was framed and presented, albeit unsuccessfully, at trial. (App. 22-25). The Judgments of the First Circuit are succinct in their rejection of ***Apprendi*** and their refusal to address the core Fifth

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[3] In ***Apprendi v. New Jersey***, this Court did not address the Fifth Amendment question that the omission of any reference to facts which might enhance a sentence might implicate the application of the Grand Jury clause in connection with the validity of an indictment and ultimate judgment of conviction. ***Apprendi***, 530 U.S. at 490 fn. 3.

Amendment challenge to Petitioner's conviction.[3] Accordingly, this case is an excellent vehicle for considering the questions presented.

ARGUMENT

A. The Indictment in the Instant Case Was Constitutionally Infirm in Failing to Charge a Federal Offense.

The Indictment (App. 22-25) fails in the charging portion to recite to any factual allegations relating to money amounts which purportedly are the grounds for the Mail and Wire Fraud Counts 1 thru 15. The factual statements in Counts 1 thru 15 pertain to "interest" checks which Petitioner remitted to the individual who claimed that he had committed acts of fraud upon her. Counts 16-18 recite no money amounts at all. Nowhere in the indictment is there a statement of the alleged loss or money amounts which formed the basis for the jury's ultimate decision to find the Petitioner guilty.

[3] At the time Petitioner submitted his Petition for Writ of Certiorari he was still in custody and was challenging the length of his sentence. Petitioner contended then and continues to posit the argument that the constitutionally mandated maximum sentence that could have been imposed under the authority of ***Winship***, ***Apprendi***, ***Ring***, ***Blakely***, and ***Booker*** was 0-6 months. Although, the Petitioner has completed his custodial sentence this issue is not moot since the supervised release portion of his Judgment of Conviction remains in doubt if this question is resolved in his favor. Moreover, the First Circuit, as asserted infra, failed to follow its own precedent in ***United States v. Antonakopoulos***, 399 F. 3d 68 (1st Cir. 2005) in not remanding for review by the district court of a constitutionally infirm sentence.

In criminal proceedings, the indictment provides the court with jurisdiction. See ***United States v. Stirone***, 361 U.S. 212 (1960). The Sixth Amendment to the Constitution requires that in all criminal proceedings, the accused shall have the right to be informed of the nature and cause of the accusations brought against him. This right has been upheld in many instances by this Court as being fundamental in the law of criminal procedure.

The constitutional pedigree of this protection is founded upon the holding in ***United States v. Cruikshank***, where this Court stated:

> "The object of the indictment, is, first, to furnish the accused with such description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. 92 U.S. 542, 558 (1876).

It was the intention of the Framers of the Constitution under the Fifth Amendment to protect defendants from the imposition of unjust punishment by ensuring that the accused in criminal proceedings were afforded the opportunity to defend against a charge upon which the government would attempt to impose punishment. ***Russell v. United States***, 369 U.S. 749, 763-64 (1962). Thus, if the government fails to include facts upon which punishment may be imposed, and does not prove these facts to a jury beyond a reasonable doubt, the conviction is constitutionally flawed. This rule has been restated and amplified upon on numerous occasions by this Court. In the case of ***In Re Winship***, 397 U.S. 358 (1970), this Court reiterated

that a defendant was entitled to a finding on each and every ***fact*** necessary to constitute the crime with which he is charged and for such findings to be found by the fact finder at trial beyond a reasonable doubt. 397 U.S. at 364.

Subsequently, this Court in ***United States v. Gaudin***, 515 U.S. 506 (1995) held that a criminal conviction must rest upon the fact finder's determination that the defendant is guilty of ***every element*** of the crime with which he is charged beyond a reasonable doubt. 515 U.S. at 510. This protection is especially important with respect to findings that would dramatically change the sentence that a defendant would face. See ***United States v. Jones***, 526 U.S. 222, 223 (1999).

Most recently, in the trilogy of cases beginning with ***Apprendi v. New Jersey***, and followed by ***Ring v. Arizona***, 536 U.S. 584 (2002), and finally in ***Blakely v. Washington***, this Court reaffirmed the vital Sixth Amendment protections afforded the criminally accused defendants. In ***Apprendi***, Justice Stevens writing for a majority of the Court stated:

> "[I]t is unconstitutional for a legislature to remove from the jury assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

530 U.S. at 490.

Subsequently, in ***Ring v. Arizona***, Justice Scalia in his concurring opinion which reaffirmed his position in ***Apprendi***[4] declared:

> "I believe that the fundamental meaning of the jury trial guarantee of the Sixth Amendment is that ***all facts*** essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the

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[4] Petitioner contended at trial and later in his initial direct appeal that all of the Circuit Courts of Appeal had relied upon the statement in ***Apprendi*** that "other than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt" as the primary teaching and holding which should be applied in connection with sentencing enhancements. This of course overlooked the primary constitutional holding which was later clarified in ***Blakely***. 124 S.Ct. at 2537. This clarification had been on-going in the various Circuits when Petitioner filed his direct appeal brief in September of 2003. Petitioner cited to ***United States v. Quinones***, 313 F. 3d 49, 53 (2d Cir. 2002) where the Second Circuit indicated that pursuant to ***Ring*** aggravating factors were required to be alleged in the indictment and found by the jury at trial beyond a reasonable doubt. Further, in ***Daniels v. Lee***, 316 F. 3d 477, 492 (4th Cir. 2003), the Fourth Circuit held that "the ***Apprendi***, ***Jones*** a ***Harris*** decisions establish the principle that, in order to pass constitutional muster, the elements of a criminal offense must be submitted to the jury and proven beyond a reasonable doubt." In addition, several other decisions appeared to implicate the proposition set forth by the Petitioner. In ***United States v. Rebmann***, 321 F. 3d 540, 545 (6th Cir. 2003), the Sixth Circuit held that ***Ring*** "has clearly re-emphasized the necessity for courts to distinguish sharply between elements of a crime requiring the full panoply of due process protections and mere sentencing facts that avoid the rigors of due process." In ***United States v. Matthews***, 312 F. 3d 652, 662 (5th Cir. 2002), the Fifth Circuit indicated that the Supreme Court in ***Apprendi*** had rejected the preponderance standard for enhancements. Thus, the First Circuit's reliance upon ***United States v. Caba***, 241 F. 3d 98, 101 (1st Cir. 2001) could not form the basis for rejecting the Petitioner's constitutional argument that his sentence and conviction should be set aside.

> offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." 536 U.S. at 602. (Concurring Opinion, Scalia, J.).

Justice Scalia's reasoning reached its nadir in ***Blakely***. In applying the above recited rule expressed in ***Apprendi***, he indicated that "two long standing tenets of common law jurisprudence" were reflected in this principle:

> "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors.' . . . and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and is no accusation in reason.'" 124 S.Ct. at 2536.

Justice Scalia, went on further in ***Blakely*** in reliance upon ***Ring v. Arizona*** to declare that:

> "Our precedents make clear . . . that the 'statutory maximum' for ***Apprendi*** purposes is the maximum sentence a judge may impose **solely on the basis of the facts reflected in the jury verdict or admitted by the defendant** . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose **without** any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all of the facts which the law makes essential to the punishment . . . and the judge exceeds his proper authority." 124 S.Ct. at 2537. (emphasis in original).

Lest there be any doubt as to the holding in ***Blakely***, and its implication to the facts of the instant case and the support it gives to Petitioner's Fifth Amendment assertions, one need only look to Justice O'Connor's dissent in ***Blakely***, where she stated:

> "Under the majority's approach, **any fact** that increases the upper bound on a judge's sentencing discretion **is an element of the offense**. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range – such as drug quantity, role in the offense, risk of bodily harm – **all must now be charged in an indictment** and submitted to a jury. . . ." 124 S.Ct. 2546 (dissenting opinion, O'Connor, J.). (emphasis added).

This is a clear acknowledgement that the over 100 year precedent and rationale expressed in ***Cruikshank*** and followed in numerous other cases with respect to indictments being required to contain allegations of every fact which is legally essential to the punishment to be inflicted, remains viable, and supports the Petitioner's Fifth Amendment challenge to his conviction.

B. The First Circuit's Failure to Address Petitioner's Fifth Amendment Challenge to His Conviction Creates a Further Conflict in the Circuit Courts Of Appeals Relative to this Issue.

To the extent that an indictment fails to allege all of the elements of the offense charged, the Court lacks jurisdiction to convict the defendant. See ***United States v. Spinner***, 180 F. 3d 514, 516 (3rd Cir. 1999). The failure of the indictment to charge an offense may be treated as a

jurisdictional defect. ***United States v. Foley***, 73 F. 3d 484, 488 (2d Cir. 1996).

Thus, any fact necessary to subject a defendant to punishment is properly considered an element of the offense. See ***Apprendi v. New Jersey***, 530 U.S. at 500-501 (concurring opinion, Thomas, J.). Justice Thomas in his ***Apprendi*** concurrence pointedly explained:

> "The aggravating fact is an element of the aggravated crime . . . If the legislature rather than creating grades of crimes has provided for setting the punishment of a crime based on some fact – such as a fine that is proportional to the value of stolen goods – that fact is an element." ***Id.***

This Court has subsequently reaffirmed the necessity of subjecting facts necessary to the imposition of punishment to the Fifth and Sixth Amendment protections. See ***Ring v. Arizona***, 536 U.S. at 602, 609; ***Blakely***, 124 S.Ct. at 2537; ***Booker***, 125 S.Ct. at 749.

The Petitioner's argument is premised on the concept that a defendant's challenge to an indictment for failure to charge an offense may be brought at any time. ***United States v. Panarella***, 277 F. 3d 678, 686 (3rd Cir. 2002). This contention is based on the view that the mail and wire fraud statutes in relation to the punishment authorized under the sentencing guidelines requires that money amounts be alleged in the indictment. A number of Circuit Courts of Appeal have held that an objection that the relevant criminal statute did not reach the specific facts alleged in the charging document shall be allowed to be raised on appeal. ***United States v. Spinner***, 180 F. 3d 514, 516 (3rd Cir. 1999); ***United States v. Cabrera-Teran***, 168 F. 3d 141, 143 (5th Cir. 1999); ***United States***

v. Caprell, 938 F. 2d 975, 977-78 (9th Cir. 1991); *United States v. Tomey*, 144 F. 3d 749, 751 (11th Cir. 1998). At least one Circuit has held to the contrary. See *United States v. Borden*, 10 F. 3d 1058 (4th Cir. 1993).

In *Spinner*, the Third Circuit stated: "happily, the rule that the indictment, to be sufficient, must contain all the elements of a crime . . . is still a vital part of our federal criminal jurisprudence." 180 F. 3d at 516. Further, in *Spinner*, the Third Circuit indicated that "The inclusion of all elements . . . derives from the Fifth Amendment, which requires that the grand jury have considered and found all of the elements to be present." *Id.* This Court in *Apprendi* indicated that a Fifth Amendment challenge involves a constitutional protection "of surpassing importance: the proscription of any deprivation of liberty without 'due process of law.'" *Apprendi*, 530 U.S. at 477.

The Due Process Clause is implicated whenever there are facts established by a standard less than "beyond a reasonable doubt" if the lawful punishment is increased above a lawful sentence that could have been imposed absent those facts. *Apprendi*, 530 U.S. at 494. Petitioner acknowledges that a number of Courts of Appeal have interpreted this Court's holding in *Booker* that "but for the mandatory nature of the Guidelines, fact-findings by the district court will not offend the Sixth Amendment." See *United States v. Ryder*, 414 F. 3d 908, 917 (8th Cir. 2005).

Whether such facts would pass constitutional muster under the Fifth Amendment remains an open question. While this Court in *Booker*, limited its holding to the Sixth Amendment right to a jury trial and did not address the requirement of proof beyond a reasonable doubt which

has its roots in the Fifth Amendment's Due Process Clause, and to the extent that making the Guidelines advisory obviated the constitutional concerns raised in that case, there is a clear distinction to be drawn between the Fifth and Sixth Amendment guarantees. See ***United States v. Pimental***, 367 F.Supp. 2d 143, 152 (D. Mass. 2005) (stating that "even if the Sixth Amendment's jury trial guarantee is not directly implicated because the regime is no longer a mandatory one, the Fifth Amendment's Due Process requirement is"). See also ***Booker***, 125 S.Ct. at 798 fn. 6 (Thomas, J., dissenting in part) ("[t]he Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by a jury or admitted by defendant.").

Thus, it remains true that after ***Blakely*** and ***Booker*** "a judge's role in sentencing is constrained at its outer limits by **the facts alleged in the indictment** and found by the jury," or by a judge with defendant's consent to judicial fact finding. See ***Apprendi***, 430 U.S. at 483 fn. 10. The refusal by the First Circuit to address the Fifth Amendment challenge to Petitioner's conviction creates a conflict between the Circuits with respect to the issue of a defendant's entitlement to make such a challenge as recited by the above authority. This Court should take this case to resolve the Circuit conflict as to this important issue.

C. The First Circuit's Decision to Apply Plain Error Review and Affirm Petitioner's Sentence Violates the Teachings Announced in *Blakely* and *Booker*.

The June 29, 2005 Judgment (App. 13) from the First Circuit is clearly erroneous in light of this Court's holdings enunciated in ***Blakely*** and ***Booker*** as described above.

First, reliance upon ***United States v. Vazquez-Rivera***, 407 F. 3d 476 (1st Cir. 2005) was misplaced. Initially, the principle adopted by the First Circuit that the ***Booker*** error "is not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased a sentence beyond that authorized by the jury verdict or an admission by the defendant; the error is only that the judge did so in a mandatory Guidelines system," is not a correct interpretation of both the remedial and merits opinions in ***Booker***.

In addition, the First Circuit's analysis of the application of the "harmless-error doctrine" is not consistent with this Court's distinguishing such error in ***Booker*** where a constitutional violation occurred. According to the First Circuit the "harmless-error" doctrine would still apply since not all errors of constitutional dimension require automatic reversal, citing ***Chapman v. California***, 386 U.S. 18, 22 (1967).

Essentially, the First Circuit rejected the challenge by Petitioner to his unconstitutional sentence which was enhanced on the basis of aggravating factors not charged in the indictment, presented to the jury and found beyond a reasonable doubt.

Secondly, in relying upon ***Vazquez-Rivera***, the First Circuit accepted the concept that there were only two

options available where ***Booker*** error was preserved and not proved harmless. Those options were to vacate the sentence and remand for resentencing or remand to the sentencing judge for a determination of whether a different sentence could be imposed under an advisory regime. See ***Vazquez-Rivera***, 407 F. 3d at p. 490. This analysis is faulty in that it overlooks the other options which Petitioner presented in his first Petition for Writ of Certiorari to this Court.

Petitioner respectfully suggests that in those cases where a defendant's Fifth Amendment grand jury and due process rights and Sixth Amendment notice rights have been abridged resentencing is impossible. Humpty Dumpty cannot be put back together again. The sentencing judge has already rendered a penalty decision based on less than a reasonable doubt standard and based on facts which were not submitted to the jury. One appropriate solution would be to retry any defendant whose sentence was impermissibly enhanced.

Although, the group of cases envisioned by this method, while meaningful, is not so large that it would create the chaos envisioned by the dissenters in ***Apprendi*** and ***Blakely***. Until this Court acts to correct these constitutionally infirm sentences, the liberty interests described above will be undermined and the principle that "a defendant is entitled to have a jury decide by proof beyond a reasonable doubt, every fact relevant to the determination of a sentence" will remain unfulfilled. ***Apprendi***, 530 U.S. at 550 (O'Connor, J., dissenting).

In order to deal with the Gordian Knot caused by impermissible enhancements in violation of the Constitution, the Petitioner urges this Court to be guided by its

holding in ***Blakely*** that "***Apprendi*** carries out this design by ensuring that the judge's authority to sentence derives ***wholly*** from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framer's intended." ***Blakely***, 124 S.Ct. at 2539 (emphasis added).

Like an artichoke, the impermissible enhanced sentences must be stripped away leaf by leaf until such time as "the maximum he [the judge] may impose ***without*** any additional findings is reached. ***Blakely***, 124 S.Ct. at 2537 (emphasis in original). In the present case, the maximum sentence the judge could have imposed without such "additional findings" was 0-6 months.[5]

In the post-***Booker*** environment the Circuit Courts of Appeal have failed miserably in adjusting those sentences which occurred "post-***Apprendi*** but pre-***Blakely*** which were unconstitutionally enhanced. The effort at utilizing "plain error" or "harmless error" review has led to inconsistent results and undermined the liberty interests preserved by the Constitution.

In the instant case, "plain error" review was not applicable in that Petitioner had preserved his Fifth and

[5] The significance of this argument should not be lost by this Court when examining the language of the First Circuit's Judgment of June 29, 2005 which was premised upon the District Judge's reliance on facts outside the record. There was no opportunity for the Petitioner to rebut or object to those facts. This clearly implicates the reason why a sentence should not be imposed based on facts not brought before the jury and found beyond a reasonable doubt. The District Judge's position that she considered the sentence she imposed as reasonable suggests a predisposition which precludes any consideration of facts or arguments which would rebut such a presumption. Furthermore, this position is contrary to and inconsistent with her written pronouncements in ***United States v. Pimental***, 367 F.Supp. 2d 143, 152 (D. Mass. 2005).

Sixth Amendment objections at trial and later on appeal. Petitioner's contention that at post-***Booker*** sentencing hearings, district judge's are required to determine the applicable guideline range and apply the appropriate factors under 18 U.S.C. § 3553(a) is clearly undermined by the First Circuit's Judgment of June 29, 2005. This Court should remand this case again to the First Circuit for their proper determination of the application of ***Booker*** which they failed to do after the remand order of January 24, 2005.

D. The Opinions Announced by this Court in *Booker* Were Not Followed by the First Circuit in the Instant Case Thereby Undermining the Sentencing Process.

As Petitioner has argued above, constitutional error plagues the entirety of the case as it relates to his conviction and more succinctly undermines the sentence which was imposed by the district court.

In ***United States v. Booker***, 543 U.S. ____, 125 S.Ct. 738 (2005) this Court invalidated the United States Sentencing Guidelines to the extent that they were applied as mandatory. 125 S.Ct. at 764. Thus, the Guidelines were now to be construed as advisory and sentences would be subject to appellate review for "reasonableness." ***Id.*** at 757, 765-66 (Breyer, J., opinion of the Court).

In imposing a sentence post-***Booker***, district court judges must follow certain prescribed sentencing procedures. ***United States v. Crosby***, 397 F. 3d 103, 113 (2d Cir. 2005); ***United States v. Mashek***, 406 F. 3d 101, 106 fn. 4 (8th Cir. 2005). District judges must continue to determine the appropriate Guidelines sentencing range,

and "must consult those Guidelines and take them into account when sentencing." ***Booker***, 125 S.Ct. 757, 767. In addition, to consulting the guidelines, district courts must also look to the factors set forth in 18 U.S.C. § 3553(a) for guidance in imposing a "reasonable" sentence. ***Id.*** 764-65, 766.

To satisfy the Sixth Amendment concerns addressed in ***Booker***, the Circuit Courts of Appeal have now held that the district judges are now charged under the Sentencing Reform Act with the duty to "impose a sentence sufficient but not greater than necessary," to comply with the sentencing purposes under the Act and to "consider the nature and circumstances of the offense and the history and characteristics of the defendant" in determining a reasonable sentence. See 18 U.S.C. § 3553(a)(1). See also ***United States v. Haack***, 403 F. 3d 997, 1002 (8th Cir. 2005).

Those same Appellate Courts have suggested that nothing in ***Booker*** indicates that district courts are required to determine the appropriate Guidelines sentencing range in any manner other than the way the sentence would have been determined pre-***Booker***. ***Crosby***, 397 F. 3d at 112.[6]

Applying those principles to the Petitioner's sentence in the instant case, he was convicted of mail and wire fraud which was punishable by a fine and up to five years of imprisonment. 18 U.S.C. § 1341 and 18 U.S.C. § 1343. Prior to ***Booker***, he could not have been sentenced to that maximum of five years because 18 U.S.C. §§ 3553(a) and (b)

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[6] As discussed in Section B, this does not take into account the Fifth Amendment issues raised by the Petitioner.

required that his sentence be determined pursuant to the U.S.S.G. As described above, based solely on his conviction for violating 18 U.S.C. § 1341 and § 1343, and ***without any additional findings***, Petitioner's total offense level under the Guidelines would have been a level 6, corresponding to a sentencing range of 0-6 months or possibly even Probation. This would have been as a result of the Government not charging in the indictment and the jury not finding beyond a reasonable doubt those enhancements which ultimately increased Petitioner's sentence.

It is Petitioner's averment that after ***Booker***, and even with the Guidelines being advisory, with the requirement of the district judges determining an applicable guideline range would have led to the same result, i.e., 0-6 months. If the district judge wished to make additional findings he/she would have faced the Fifth Amendment arguments expressed above. Some courts have persuasively argued that in calculating a sentencing range under the Guidelines, courts should only rely on facts charged in the indictment and proven to a jury beyond a reasonable doubt. See ***United States v. Huerta-Rodriguez***, 355 F.Supp. 2d 1019, 1027 (D. Neb. 2005). That approach would result in the offense level calculation and imposition of the sentence noted above.

As clearly stated in ***Apprendi***, a Fifth Amendment challenge involves a constitutional protection "of surpassing importance: the proscription of any deprivation of liberty without 'due process of law.'" 530 U.S. at 477. The contention by the Government and the acceptance by many of the Circuit Courts of Appeal that by making the Guidelines merely advisory, that the statutory maximum set forth in the United States Code, is again the maximum sentence faced by a defendant, would contravene the

holdings in ***Blakely***. 124 S.Ct. at 2537. See also ***Ring v. Arizona***, 536 U.S. at 602.

The problem relates to how the Circuit Courts of Appeal are applying the merits and remedial opinions in ***Booker***. Petitioner's view comports with what one jurist has suggested:

> "In ***Booker***, the Supreme Court stated that enhancements resulting from judge found (rather than jury found or admitted) facts violate the Sixth Amendment. 125 S.Ct. at 755-56. Importantly, Booker's companion petitioner, Fanfan, had received a sentence that did not violate the Sixth Amendment but was nonetheless deemed unconstitutional because it was imposed under a mandatory guideline regime. ***Id.*** at 768. ***Any*** sentence handed down under a mandatory guideline regime is unconstitutional." ***United States v. Paladino***, 401 F. 3d 471, 490 (7th Cir. 2005) (Kanne, J., dissenting opinion).

The First Circuit has entirely misinterpreted the application of ***Blakely*** and ***Booker*** to the facts of this case. ***Blakely*** broadened the teachings enunciated in ***Apprendi*** by mandating that all of the facts "which the law makes essential to the punishment" be subject to Sixth Amendment protections. 124 S.Ct. at 2537. In ***Booker***, this Court made clear the nature of the Sixth Amendment right that was violated: "the defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to punishment . . . That right is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" ***Booker***, 125 S.Ct. at 749.

The separate determination by this Court to make the Guidelines advisory was a forward-looking remedy that does not change the fundamental Fifth and Sixth Amendment errors that are at issue in the instant case.

The First Circuit was therefore incorrect in analyzing the case from the perspective of "plain-error" review when here as unlike what occurred in ***Antonakopoulous***, the constitutional error was preserved. The Court of Appeals also erred in focusing primarily on the question of whether Petitioner's sentence would have been different under a discretionary sentencing regime. As several Circuits have indicated, it is sufficient for a defendant to establish that his pre-***Booker*** sentence under the Guidelines would have been lower in the absence of unconstitutional judicial factfinding.

See ***United States v. Hughes***, 396 F. 3d 374 (4th Cir. 2005); ***United States v. Ameline***, 2005 WL 350811 (9th Cir. 2005); ***United States v. Milan***, 2005 WL 309934 (6th Cir. 2005); ***United States v. Davis***, 2005 WL 334370 (3rd Cir. 2005). Again, the First Circuit's requirement that a defendant must establish what might have happened if the sentencing judge had been given post-***Booker***-style discretion is erroneous. See ***United States v. Hughes***, 396 F. 3d 374, 380 fn. 6 (4th Cir. 2005).

The First Circuit's premise that "plain-error" review applies is not only erroneous, it overlooks the Fifth and Sixth Amendment constitutional errors which are not subject to this type of review. Petitioner and other defendants similarly situated should not be denied the imposition of a constitutional sentence by the application of a review standard not contemplated or expressed in the holdings in ***Blakely*** and ***Booker***.

The sentence imposed against the Petitioner in the instant case violates the Constitution and should be reversed.

CONCLUSION

For the above recited reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID G. STERN
Petitioner Pro Se
24 Elm Street
Newport, RI 02840

APPENDIX

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MANDATE

United States Court of Appeals
For the First Circuit

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Lipez and Howard, *Circuit Judges*.

JUDGMENT

Entered: February 19, 2004

Appellant David Stern moves for bail pending appeal. Because briefing is complete, we reach the merits of the appeal, *affirm* the judgment of the district court, and *deny* the motion for bail as moot. *See* 1st Cir. R. 27(c).

Stern acknowledges that this Court has already rejected his argument invoking *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). "*Apprendi* simply does not apply to guideline findings that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest

applicable statutory maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001). "Nothing in *Apprendi* or [other] cases" – including *Ring* v. *Arizona*, 536 U.S. 584 (2002), the grant of certiorari in *Blakely* v. *Washington*, 124 S.Ct. 429 (Oct. 20, 2003), and *United States* v. *R.L.C.*, 503 U.S. 291 (1992), the trio of cases cited by Stern – "calls into question the validity of the Sentencing Guidelines." *United States* v. *Goodine*, 326 F.3d 26, 33 (1st Cir. 2003), *pet. for cert. filed* (Oct. 16, 2003). For the present we have no reason to think that *Apprendi* will be applied to the federal guidelines.

We are unpersuaded by any of Stern's challenges to his sentence. Stern cultivated a position of trust that grew out of, but extended beyond, his formal representation of Dvorah Nagiel. Without that position (and the insider knowledge he gleaned from it), he could not have so easily convinced her to entrust him with half of her divorce settlement. Stern concealed the offense with tax counsel and promissory notes that he claimed would be honored by "any court in America." The district court supportably found that the "relationship of trust" between Stern and Nagiel "facilitated his commission of the offense."

The court also correctly calculated the amount of loss from Stern's scheme. "Loss is a proxy for the seriousness of the offense"; a loss of zero in this case would be "presumptively wrong" because "it does not even remotely approximate [Stern's] wrongdoing." *United States* v. *Parsons*, 141 F.3d 386, 392 (1st Cir. 1998). The court observed, and Stern does not seriously dispute, that he took his former client's money even as he was being disbarred for misappropriating funds from other clients. The loss determination would be justified even if Stern had intended to repay Nagiel.

Finally, we find the indictment and the evidence sufficient on all counts. The fourteen mailings of "interest" payments (Counts 1-14) were not "incidental to the scheme," as Stern argues. They were the secure hook that kept Nagiel invested. The evidence showed that Stern procured the gold certificate confirmation letter by calling Alan Sugar (Counts 16-17). The letter encouraged Nagiel to contact Sugar or Stern if she had questions. Thus, it was foreseeable to Stern that she might use the wires to remind Sugar of his representations (Count 18).

The one close question is whether Stern caused the fax charged in Count 18 to be sent "for the purpose of executing" his scheme, as the wire fraud statute requires. We find it significant that Nagiel contacted Sugar as the letter had counseled her to do; that the fax itself, as Stern notes, bespeaks no awareness of the fraud; and that she informed Stern of her efforts, giving him a final opportunity to put her fears to rest by having her slip the gold certificate "under [her] pillow." For the purposes of the scheme, it was better that she follow the instructions of the letter rather than go directly to the authorities "[A]lthough potentially dangerous to the continuation of defendant's . . . scheme," the fax "was still in furtherance of the scheme" in that it "engender[ed] . . . circumstances in which [Stern] could do [something] to forestall discovery." *United States* v. *Pietri Giraldi*, 864 F.2d 222, 226 (1st Cir. 1988). For these reasons, the fax is distinguishable, from other communications by victims, the overt purpose of which is to oppose the fraud. *See United States* v. *Castile*, 795 F.2d 1273, 1279 (6th Cir. 1986) ("To the extent that the insurance investigation tended to produce evidence of Castile's involvement [in arson], it conflicted with Castile's purpose and would not have furthered his

scheme."); *United States* v. *LaFerriere*, 546 F.2d 182, 186-87 (5th Cir. 1977) (where the "victim strongly suspected that he was victim of a fraud," the "only likely effect" of demand letter by his lawyer threatening suit "would be to further detection of the fraud or to deter its continuation").

We think it useful to observe that Count 18 is unquestionably a stretch and is barely sustainable. In this instance there is no reason to think that it makes any difference to the sentence and the appeal as to it would probably be moot but for the small monetary penalty imposed for each count of conviction. Also, there is at least some basis to argue about whether the defendant fully preserved all aspects of the objection to it now pressed on appeal. If the central case against Stern hung significantly upon this count, we would be far more hesitant to affirm summarily.

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk.

[Cert. Copies to Hon. Nancy Gertner and Tony Anastas, Clerk, United States District Court for the District of Massachusetts]

[cc: Messrs. Stern, Pineault and Ms's Chaitowitz and Young]

United States Court of Appeals
For the First Circuit

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Torruella, Selya, Lynch, Lipez and
Howard, *Circuit Judges*.

ORDER OF COURT

Entered: April 22, 2004

The petition for panel rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is

ordered that the petition for rehearing and petition for rehearing en banc be *denied*.

By the Court:
Richard Cushing Donovan, Clerk

By: MARK R. SYSKA
Chief Deputy Clerk.

[cc: Messrs. Stern, Pineault, Ms's Chaitowitz and Young]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 7, 2004

Mr. David Stern
Prisoner ID 23799-038 Unit I
P.O. Box 879
Ayer, MA 01432

Re: David G. Stern
v. United States
Application No. 04A17

Dear Mr. Stern:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on July 7, 2004 extended the time to and including September 19, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ [Illegible]
Sandy Spagnolo
Case Analyst

United States Court of Appeals
For the First Circuit

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Lipez and Howard, *Circuit Judges*.

ORDER OF COURT

Entered: August 16, 2004

The motions to recall mandate and to reconsider application for bail are *denied*. We are not persuaded that our decision was "demonstrably wrong," *Legate* v. *Maloney*, 348 F.2d 164, 166 (1st Cir. 1965), in light of *Blakely* v. *Washington*, 124 S.Ct. 2531 (2004); and in any event the appellant may petition the Supreme Court for a writ of certiorari. Even assuming that the Supreme Court invalidates the Federal Guidelines in a pending case, the appellant has not shown that he is "likely to [obtain] . . . a

reduced sentence . . . less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B)(iv).

By the Court:
Richard Cushing Donovan, Clerk

By:_____
Chief Deputy Clerk

[cc: Messrs: Stern, Pineault, Ms. Chaitowitz and Ms. Young]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 24, 2005

Mr. David Stern
Prisoner ID 23799-038
24 Elm Street
Newport, RI 02840

Re: David G. Stern
v. United States
No. 04-385

Dear Mr. Stern:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the First Circuit, for further consideration in light of United States v. Booker, 543 U.S. ___ (2005).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or

mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

United States Court of Appeals
For the First Circuit

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

ORDER OF COURT

Entered: May 11, 2005

In view of the Supreme Court's January 24, 2005 judgment vacating and remanding for further consideration in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005), we invite supplemental briefing as follows.

If defendant is seeking a remand to the district court for resentencing in light of *Booker* and *United States* v. *Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005), defendant is directed to file and serve a supplemental brief, not to exceed 10 pages, within 10 calendar days of this order, in compliance with applicable rules concerning briefing, and addressing the following issues:

1. The brief should indicate, with references to the record, whether and, if so, how the alleged *Booker* error was preserved below. *See Antonakopoulos*, 399 F.3d at 76.

2. If the error was not preserved below or there is a dispute about whether the error was preserved, defendant

should specify, in accordance with the standards set forth in *Antonakopoulos*, the circumstances warranting a remand including in particular those creating a reasonable probability that the district court would impose a more favorable sentence under non-mandatory Guidelines and other applicable factors.

3. The government shall file a response, in compliance with the applicable rules, not to exceed 10 pages, within 10 calendar days of service of the defendant's supplemental brief. If the government concedes that the alleged error was preserved below but does not concede that the sentence should be vacated and remanded, the government should demonstrate why the alleged error was harmless.

4. In both filings, citations to the record should be included where possible. The defendant's brief is free to proffer pertinent facts not in the record and the government is free to counter proffer. This invitation is without prejudice to a decision by the panel as to what significance should be attached to such proffers.

By the Court:

Richard Cushing Donovan, Clerk.

By: MARGARET CARTER [Stamp]
Chief Deputy Clerk.

[cc: Michael J. Pineault, AUSA, Dina Michael Chaitowitz, AUSA, Cynthia A. Young, AUSA, David G. Stern]

United States Court of Appeals
For the First Circuit

MANDATE

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Lipez and Howard, *Circuit Judges*.

JUDGMENT

Entered: June 29, 2005

The defendant's conviction and sentence are *affirmed*. *See* 1st Cir. R. 27(c). His arguments in the supplemental brief misapprehend both the remedial opinion in *Booker* and circuit precedent, and we reject them out of hand. In light of the district court's statements at sentencing and in its Order of March 23, 2005, denying his motion for release, we are "convinced that a lower sentence would not have been imposed had the Guidelines been advisory." *United States* v. *Vázquez-Rivera*, 407 F.3d 476, 489 (1st Cir. 2005). The Sixth Amendment error was therefore harmless beyond a reasonable doubt. *Id.*

Affirmed.

Certified and issued as
Mandate under Fed. R.
App. P. 41.
Richard Cushing Donovan,
Clerk

/s/ Linda Barry
Deputy Clerk

By the Court:

Richard Cushing Donovan, Clerk

By: MARGARET CARTER [Stamp]
Chief Deputy Clerk

Date: Jul. 20, 2005

[cc: Messrs: Stern, Pineault, Ms. Chaitowitz and Ms. Young]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

August 24, 2005

Mr. David Stern
Prisoner ID 23799-038
24 Elm Street
Newport, RI 02840

Re: David G. Stern
v. United States
Application No. 05A-182

Dear Mr. Stern:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on August 24, 2005 extended the time to and including November 26, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ [Illegible]
Sandy Spagnolo
Case Analyst

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	) CRIMINAL NO. 1:01 [illegible] 10266 ng
v.	) VIOLATIONS:
DAVID G. STERN,	) 18 U.S.C. § 1341 (Mail Fraud)) 18 U.S.C. § 1343 (Wire Fraud)
Defendant.	) 18 U.S.C. § 2 (Aiding and Abetting)

INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

1. At all times material to this Indictment, Defendant DAVID G. STERN (hereafter, "STERN") was an individual who resided at 29 Woodbine Road, Belmont, Massachusetts.

2. At times material to this Indictment, STERN was an attorney licensed to practice law in the Commonwealth of Massachusetts.

3. At times material to this Indictment, STERN provided legal representation to a client named Dvorah Nagiel (hereafter, "Nagiel") in a divorce action then pending in the Commonwealth of Massachusetts.

4. At times material to this Indictment, Nagiel received financial payments from her former husband in connection with the settlement of her divorce action.

5. Following Nagiel's divorce settlement, STERN contacted Nagiel and informed her of an investment opportunity that was supposedly available through a pension fund manager that STERN knew at BayBank

(hereafter, the "BayBank fund"). STERN stated, among other things, that he intended to invest money in the BayBank fund himself and that if Nagiel wished to participate in the BayBank fund as well, she should give her money to him. STERN stated that the investment would be held in his name and that he would write personal checks to Nagiel for the dividends generated by the investment.

6. On or about January 10, 1996, Nagiel gave STERN two $10,000 checks to be invested in the BayBank fund. Over the course of the next six months, STERN periodically contacted Nagiel to inform her of further opportunities to invest in the BayBank fund. In response to these solicitations, Nagiel gave STERN four additional checks to be invested in the BayBank fund. The total amount of the checks that Nagiel gave to STERN between January, 1996 and July, 1996 for investment in the BayBank fund was $200,000.

7. In a letter to Nagiel dated June 10, 1996, STERN confirmed "the current status of those funds which you [Nagiel] asked me to invest." The letter set forth, *inter alia*, the interest payments due on the invested amounts.

8. In a second letter to Nagiel dated July 30, 1996, STERN again confirmed "the current status of those funds which you [Nagiel] asked me to invest as of August 1, 1996." STERN's second letter also set forth, *inter alia*, the interest payments due on the invested amounts.

9. Beginning on or about June 10, 1996, STERN began sending Nagiel checks representing the interest payments supposedly generated by Nagiel's investment in the BayBank fund. The amount of each check ranged from

$1,250 to $3,750. Stern sent the checks to Nagiel via United States Postal Service mail.

10. Contrary to his statements to Nagiel, STERN never invested Nagiel's funds in the BayBank fund, if such an investment fund ever existed. Instead, STERN deposited Nagiel's checks into his personal and law firm bank accounts and spent the money on a variety of expenses.

11. In or about June, 1997, STERN contacted Nagiel regarding a second investment opportunity. STERN stated that the second opportunity involved a gold certificate being offered by a friend of STERN'S named Alan Sugar. STERN stated, among other things, that his family intended to invest one million dollars in the certificate and that as a "favor" to Nagiel, STERN was offering her the opportunity to join them for $250,000.

12. On or about June 25, 1997, Nagiel gave STERN a $250,000 check for this gold investment. At or about the same time, Nagiel received a letter from Alan Sugar at First Fidelity Surety, Inc., dated June 24, 1997, confirming that Nagiel had been "assigned an undivided 25% interest in gold certificate G01025AU." Sugar sent the letter to Nagiel as the result of a telephone call made by STERN to Sugar requesting that the letter be sent.

13. Contrary to STERN's representations, however, there was no gold, and Nagiel had no enforceable ownership interest in any certificate. The gold certificate referenced in Sugar's June 24, 1997 letter (No. G01025AU) listed Sugar's company, First Fidelity Surety, Inc. as the registered owner; stated on its face that First Fidelity had no right to transfer ownership in the certificate excerpt pursuant to the terms set forth in the certificate; and also stated on its face that the certificate did not grant First

Fidelity an enforceable entitlement to receive gold coin or bullion but instead could be satisfied through the delivery of 2,500 tons of rock ("gold ore").

14. STERN never invested Nagiel's money in gold or in a gold certificate. Rather, STERN deposited Nagiel's $250,000 check into his personal bank account and spent the money on a variety of expenses.

15. In or about February, 1998, Nagiel telephoned Sugar to inquire about her $250,000 "gold" investment. In connection with that inquiry, on or about February 12, 1998, Nagiel faxed to Sugar a copy of Sugar's June 24, 1997 letter.

16. Neither Sugar nor STERN returned Nagiel's $250,000 "gold" investment to her in February or March, 1998. STERN also failed to return to Nagiel in February or March, 1998 the $200,000 that Nagiel had given him to invest in the BayBank fund.

17. In or about March, 1998, Nagiel filed a civil lawsuit against STERN seeking the return, *inter alia*, of the $450,000 that she had given to him to invest in the BayBank fund and in the gold investment. Thereafter, the United States commenced a criminal investigation of STERN's financial transactions with Nagiel.

18. On or about August 6, 1998, agents from the Federal Bureau of Investigation ("FBI") interviewed STERN concerning his dealings with Nagiel.

19. In or about December, 1998, STERN entered into a settlement agreement with Nagiel pursuant to which he agreed to repay the money that Nagiel had given to him. At the time that STERN entered into the settlement agreement, Nagiel had obtained judicial attachments and

liens against STERN's personal residence and bank accounts. In addition, STERN was aware of the FBI's investigation.

COUNTS ONE through SIXTEEN

(Mail Fraud – 18 U.S.C. § 1341)

20. The Grand Jury re-alleges and incorporates by reference paragraphs 1-19 of this Indictment and further charges that:

21. On or about the dates set forth below, in the District of Massachusetts and elsewhere, the defendant DAVID G. STERN, having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, for the purpose of executing and attempting to do so, did cause persons to place in post offices and authorized depositories for mail matter, matters and things to be sent and delivered by the United States Postal Service or by private or commercial carrier, and caused to be deposited matters and things to be sent or delivered by the United States Postal Serice or by a private or commercial interstate carrier, and took and received therefrom, such matters and things, and knowingly caused to be delivered by the United States Postal Service mail or by private or commercial carrier according to the directions thereon, such matters and things, as follows:

Count	Date	Mailing
1	9/16/96	Check to Dvorah Nagiel in the amount of $3,750.
2	10/7/96	Check to Dvorah Nagiel in the amount of $1,250.

3	11/12/96	Check to Dvorah Nagiel in the amount of $1,250.
4	12/9/96	Check to Dvorah Nagiel in the amount of $2,500.
5	2/5/97	Check to Dvorah Nagiel in the amount of $2,500.
6	3/19/97	Check to Dvorah Nagiel in the amount of $2,500.
7	5/8/97	Check to Dvorah Nagiel in the amount of $2,500.
8	6/11/97	Check to Dvorah Nagiel in the amount of $2,500.
9	7/28/97	Check to Dvorah Nagiel in the amount of $1,250.
10	8/11/97	Check to Dvorah Nagiel in the amount of $2,500.
11	9/19/97	Check to Dvorah Nagiel in the amount of $2,500.
12	11/18/97	Check to Dvorah Nagiel in the amount of $1,250.
13	1/13/98	Check to Dvorah Nagiel in the amount of $2,500.
14	2/13/98	Check to Dvorah Nagiel in the amount of $1,250.
15	3/4/98	Check to Dvorah Nagiel in the amount of $2,500.
16	6/24/97	Letter from Alan Sugar to Dvorah Nagiel

All in violation of Title 18, United States Code, Section 1341 and Title 18, United States Code, Section 2.

COUNTS SEVENTEEN and EIGHTEEN

(WIRE FRAUD – 18 U.S.C. § 1343)

22. The Grand Jury re-alleges and incorporates by reference paragraphs 1-19 of this Indictment and further charges that:

23. On or about the dates set forth below, in the District of Massachusetts and elsewhere, the defendant DAVID G. STERN, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, as follows:

Count	Date	Wire Communication
17	6/24/97	Telephone call from STERN in Massachusetts to Alan Sugar in North Carolina regarding letter to Dvorah Nagiel.
18	2/12/98	Facsimile from Dvorah Nagiel in Massachusetts to Alan Sugar in North Carolina regarding 6/24/97 letter to Nagiel.

All in violation of Title 18, United States Code, Section 1343 and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ [Illegible]
FOREPERSON OF THE
GRAND JURY

/s/ [Illegible]
Assistant United States
Attorney

DISTRICT OF MASSACHUSETTS July 18, 2001 at 3:35 P.M.

Returned into the District Court by the Grand Jurors and filed.

/s/ [Illegible]
DEPUTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	Criminal No. 01-10266-NG
v.	April 4, 2002
DAVID STERN	Boston, Massachusetts

FOURTH DAY OF TRIAL
TRANSCRIPT OF THE EVIDENCE
BEFORE HONORABLE NANCY GERTNER,
UNITED STATES DISTRICT JUDGE,
AND A JURY

APPEARANCES:

For the Government: Michael J. Pineault
Assistant United States Attorney
Office of the U.S. Attorney
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, Massachusetts 02210

For the Defendant: Stephen B. Hrones, Esq.
Hrones & Harwood
Lewis Wharf – Bay 232
Boston, MA 02110

Court Reporter: Harold M. Hagopian, RDR, CRR
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 3204
Boston, MA 02210
Telephone: (617) 946-0900

* * *

[250] Counsel?

SIDEBAR CONFERENCE:

MR. HRONES: Your Honor, it just struck me that I should make an *Apprendi* objection now, because the loss, if he's convicted, it's going to be a question of amount of loss.

THE COURT: Right.

MR. HRONES: That's a jury question under *Apprendi*.

THE COURT: Uh-huh.

MR. HRONES: And as to basic offenses like six months, but it can be kicked up to years in prison based on loss. So it's my position that the jury should be – has to determine loss in this case.

THE COURT: Mr. Pineault?

MR. HRONES: I'd also object to the fact that they don't have the loss amount in the indictment. In other words, because he didn't indict on that, the most – I mean, the loss cannot figure into the sentence in any way, so the maximum he can get is six months.

MR. PINEAULT: I disagree, your Honor. The loss computation is to be performed pursuant to the sentencing guidelines by the Court, and I don't have the indictment right in front of me, but it does allege with particularity each of the frauds, the BayBank fraud and the gold.

THE COURT: And the verdict slip will – if they – check off a particular count, since it's a particular [251] check, to some degree, would wind up with loss in any event.

MR. HRONES: That's not the loss, though, that's the amount he paid in interest.

THE COURT: Right.

MR. HRONES: So the verdict slip doesn't determine the amount of loss.

MR. PINEAULT: But the – I mean, the verdict they return on a particular count will indicate whether they found a particular fraud scheme has been established beyond a reasonable doubt and the loss flows from that.

MR. HRONES: But it doesn't because he just told –

THE COURT: I know you're trying to put it on the record, but I will give you an opportunity, if you think the jury slip should have loss on it, I'll give you an opportunity to put that on the jury slip.

MR. HRONES: Oh, you will?

THE COURT: Yes.

MR. HRONES: Fine. Then – then I want that on the jury slip.

THE COURT: Okay. Does the government have an objection to that?

MR. PINEAULT: I don't – I haven't researched, your Honor. I'm not sure whether that would simply be advisory at that point.

THE COURT: Right.

[252] MR. PINEAULT: I don't see any harm in putting it down, and we can research later whether it's simply advisory or not.

THE COURT: So, what we would do is we would say – well, I just came up with this.

MR. HRONES: As the last question.

THE COURT: Total amount of loss, did you, in fact include testimony of the total amount?

MR. PINEAULT: Your Honor, I don't think we should go down this road.

THE COURT: I agree.

MR. PINEAULT: Because that may get into the issue of how you define a loss.

THE COURT: And how you define payment.

Okay, we'll leave it as it is. Anything else, Mr. Hrones?

MR. HRONES: No, your Honor.

MR. PINEAULT: Nothing from the government, your Honor.

THE COURT: Okay.

END OF SIDEBAR CONFERENCE:

THE COURT: There was nothing further, ladies and gentlemen. At this point you can take your notes, and all rise for the jury.

(The jury retired to deliberate at 11:15 a.m.)

* * *
